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IN THE

Supreme Court of the United States

October Term, 1970
No. 5175

ADOLFO PEREZ and EMMA PEREZ, Husband and Wife, and EMMA PEREZ for her separate self,

Appellants,

vs.

DAVID H. CAMPBELL, Superintendent, Motor Vehicle Division, Arizona Highway Department, etc., *et al.*,

Respondents.

On Writ of Certiorari From the Judgment of the Ninth Circuit of Appeal, and Numbered Therein 23463.

Motion for Leave to File Amicus Curiae Brief Under Rule 42 Perez v. Campbell, Docket No. 5175.

Pursuant to Rule 42 of the United States Supreme Court, the Women's Center Legal Program and the Western Center on Law and Poverty respectfully move this Court for leave to file an *amicus curiae* brief herein on behalf of Emma Perez.

The primary interest of the Women's Center Legal Program is women's rights. The Western Center on Law and Poverty is primarily interested in the legal problems of poor women.

The *amicus curiae* brief raises constitutional issues not explicitly argued by Emma Perez' counsel, who

has requested that this brief be submitted. In his brief, counsel for Emma Perez has argued that the loss of her driver's license is not only in conflict with Federal bankruptcy law but also irrational. The *amicus* brief directs itself to the constitutional issues of equal protection inherent in an irrational legal result based on class discrimination. The constitutional arguments made in the *amicus curiae* brief are central to the disposition of this matter and will not otherwise be before this Court.

In a case such as this where the appellants must proceed *in forma pauperis* under severe financial limitations, it is especially important that *amicus curiae* be permitted to assist in the full presentation of the issues and arguments. We therefore respectfully request permission to file this brief under Rule 42 of the Supreme Court of the United States.

Respectfully submitted,

DAVID A. BINDER

Summary of Argument.

Emma Perez has been deprived of her driver's license through no fault of her own, but solely on the basis that she is a wife. The rationale of the lower court was that as the co-owner of the community vehicle, she is responsible for its misuse under the Arizona financial responsibility law. The flaw in this reasoning is that, unlike other owners, Mrs. Perez was deprived of control and management, not only over the community vehicle, but also over all other community assets, by the Arizona law giving her husband the exclusive control and management of the marital community property. Therefore, unlike other owners, Mrs. Perez had no legal or practical way of complying with the Arizona financial responsibility requirements.

On the basis of her sex, the state of Arizona has deprived Mrs. Perez not only of her driver's license, but also of her right to share in the management and control of her own property.

The Constitution requires that legal classifications be reasonable. Where important personal or property rights are in jeopardy, this Court has traditionally scrutinized classifications with great care. Moreover, classifications based on an unavoidable and permanent accident of birth, for example, race, are particularly suspect. This Court has further held that when a state deprives members of a particular class of important rights, the burden is upon the state to demonstrate that the classification is necessary to promote a compelling governmental interest.

The *amicus* brief applies the foregoing principles in re-examining the old rule that sex, without more, is a valid basis for legislative classification. An analysis of

the old case law and some of its historical background has been included in order to shed light on how this old rule came into being. Then follows contemporary scientific and sociological evidence demonstrating that the rule is based on false assumptions and that it is unreasonable. Trends in contemporary law showing that the rule is in conflict with our egalitarian heritage and our constitutional mandates are discussed. The parallel with the Negro struggle for civil rights is then examined, not only for its historical analogy, but also because it offers ample legal precedent for reversing an outmoded rule in the light of advancing constitutional standards.

In conclusion, the Court is urged to grant Emma Perez the relief she seeks, and to incorporate into the highest law of this land the principle that women, along with members of racial and ethnic minorities, must be accorded equal human dignity under our law.

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AMICUS CURIAE BRIEF.

I.

The Constitutional Question.

This Court is called upon to decide herein whether a state law can deprive a person of her right to drive on the sole basis that she is a wife.

In 1963 the President's Commission on the Status of Women made the following appeal to this Court:

> "Early and definitive court pronouncement, particularly by the U. S. Supreme Court, is urgently needed with regard to the validity under the fifth and fourteenth amendments of laws and official practices discriminating against women, to the end that the principle of equality becomes firmly established in constitutional doctrine."[1]

[1] *American Women*, Report of the President's Commission on the Status of Women, October, 1963, p. 45.

This Court has a number of choices in deciding the case. One would be to affirm the view that ". . . the loss of her driver's license is the price an Arizona wife must pay for negligent driving by her husband,"[2] and deny appellant any relief. The Court cannot reach this conclusion without facing and rejecting the constitutional arguments presented in this brief, because such a holding affirms the rule that sex is a reasonable basis for legislative classification.[3]

Another alternative would be to declare that Mrs. Perez is not in the class of owners contemplated by the Arizona financial responsibility law, having, as a wife, been deprived by law of any control and management of the community property. This would grant Mrs. Perez the relief she seeks. However, without more, this alternative would uphold the rule that sex is a valid basis for legislative classification. Not only that, but such a holding would set back the rights of wives in community property states since it requires the legal conclusion that the "present, equal, and vested"[4] interests of wives in community property states are no more than a sham and a fiction.

We urge this Court to follow a third alternative: to grant Mrs. Perez the equitable relief she seeks, while at the same time recognizing that the root cause of her legal plight is an unconstitutional rule of law, a rule of law based on the untenable premise that women are incompetent and inferior.[5] We ask this Court to

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[2]*Perez v. Campbell*, 421 F. 2d 619, 624 (9th Circuit 1970).

[3]A rule that was formulated in *Muller v. Oregon*, 208 U.S. 412 (1908) and which has not since been directly dealt with by this Court.

[4]See, *e.g.*, Cal. Civ. Code §5105.

[5]See, *e.g.*, the language in *Muller v. Oregon*, 208 U.S. 412 (1908), pp. 421-422.

rule that this old classification can no longer be upheld in the light of scientific knowledge, social realities, and egalitarian principles of justice.

II.

Ownership and the Financial Responsibility Law.

Starting with paragraph five, the lower court decision deals with the appeal of Emma Perez:

> "Mrs. Perez argues that the automobile was registered in her husband's name, he was the negligent driver and, although the automobile was community property [footnote omitted] and she, as a member of the community, confessed judgment that, nevertheless, the decisive logic of *Kesler* and *Reitz* should be confined to the driver of the automobile, such as her husband. She reasons that the rules stated in those cases should not be applied to an innocent wife who had no connection whatsoever with the conduct which was responsible for confession and entry of the judgment."[6]

The court below then proceeds to point out that under Arizona law Mrs. Perez had no choice but to add her name to the confession of judgment[7] and goes on to reject Mrs. Perez' plea:

> "Starting with the fundamental premise that *ownership of the vehicle was in the community of husband and wife and that Mrs. Perez' ownership was equal to her husband's, subject to her husband's right to administer the property.* . . . [citation omitted] It seems to us that Mrs. Perez' le-

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[6]*Perez v. Campbell*, 421 F. 2d 619, 622-623 (9th Circuit 1970).

[7]*Ibid.*, 623.

> gal status, on the facts before us, is closely analogous to that of an automobile owner who permits another to drive it. If the driver is negligent, judgment is entered against both the driver and the owner, or the owner alone."[8] (Emphasis added).

The owner of an automobile may lose his license on account of an unsatisfied judgment even when he was not driving or in any way negligent on the rationale that one who permits the use of a vehicle should share the responsibility for its misuse.[9]

The justification is that the owner has a choice. He does not have to permit someone else to use (or manage and control) his car; he has the power to give or to withhold that use (or management and control). As the opinion of the Ninth Circuit points out, Mrs. Perez never had any such choice or power:

> "The statutory and decisional law of Arizona make the husband what might be termed the managing agent of the wife in the control of the community automobile."[10]

III.

The Community Property Law.

Mrs. Perez' ownership had none of the characteristics normally associated with ownership[11] such as the right to buy and sell, hypothecate, use, or authorize

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[8]*Id.*

[9]See, *e.g.*, *Sheehan v. Dept. of Motor Vehicles*, 140 Cal. App. 200, 205 (1934).

[10]*Perez v. Campbell*, 421 F. 2d 619, 624 (9th Circuit 1970).

[11]See, *e.g.*, *Ackerman v. Port of Seattle*, 329 P. 2d 210, 215 (Wash. 1958); *United States v. Lutz*, 295 F. 2d 736, 740-741 (5th Circuit, 1961); *Smith v. Simpson*, 260 N.C. 601, 609, 133 S.E. 2d 474, 481 (1963).

the use of the property. Under Arizona law the husband is given exclusive management and control over the marital community property.[12] Therefore, Mrs. Perez did not have any legal control over the use of the community automobile. Mrs. Perez could not legally have insured it. Further, since she had no control over the management of the remaining community assets, neither did she have any practical way of insuring it.[13] Under these circumstances, to call Mrs. Perez the owner of the community automobile as defined by the driver responsibility case law is little more than a semantic exercise.

The court below has suggested that Mrs. Perez could have avoided the whole problem by simply buying her own car with separate funds and seeing to it that her husband buy his own car with his separate funds.[14] Unfortunately there was not even enough money to buy insurance on the one car registered in Mr. Perez' name.

What befell Mrs. Perez befell her solely because of her sex. It all happened, as the lower court explained to her, because she is a wife.[15]

IV.

The Constitutional Argument.

"When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for dif-

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[12]*Spector v. Spector,* 94 Ariz. 175, 382 P. 2d 659 (1963); *Mortensen v. Knight,* 81 Ariz. 325, 305 P. 2d 463 (1957).

[13]Contrast *Mostensen v. Knight, supra,* where liability was imposed upon a husband for his wife's negligent operation of a community vehicle *because* of the husband's exclusive control, with the instant case where liability was imposed upon the wife *despite* the husband's control.

[14]*Perez v. Campbell, supra,* p. 623.

[15]*Ibid.,* p. 624.

ferent treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."[16]

The egalitarian principles of our constitution require that people be treated as individuals. Accordingly, classifications based on race "must be scrutinized with particular care."[17] Sex is analogous to race in that both are unavoidable and permanent accidents of birth.

State laws that abridge fundamental rights are particularly suspect under the Fourteenth Amendment. A legal classification that curtails or takes away a basic right constitutes invidious discrimination "unless shown to be necessary to promote a compelling governmental interest."[18]

The rights of which Mrs. Perez has been deprived on account of her sex are two such important and basic rights. The right to travel freely has been classified as fundamental by this Court.[19] The right to drive is a necessary corollary to that right in today's motorized society.[20] Property rights are explicitly

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[16]*Hernandez v. Texas*, 374 U.S. 475, 478 (1954).

[17]*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[18]*Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

[19]*Shapiro v. Thompson*, 394 U.S. 618 (1969).

[20]*E.g.*, a recent survey indicated that 82 percent of commuters use automobiles in order to get to work. *Automobile Facts and Figures*, 1970 Ed. publ. by Automobile Manufacturers Association, Inc., at p. 53, data taken from U.S. Dept. of Commerce, Bureau of the Census report "Home to Work Travel Survey." Further, 86 percent of all travelers use automobiles. *Automobiles Facts and Figures, op. cit.*, at p. 51, data taken from U.S. Dept. of Commerce, Bureau of the Census, 1967 National Travel Survey. The estimated number of motor vehicles that will be registered in the United States in 1970 is 108,977,000. U.S. Dept. of Transportation, Federal Highway Administration, News Release for September 16, 1970.

guaranteed by the Constitution[21] and by innumerable court decisions.[22] The right to manage and control one's property is inherent in the concept of property and a necessary incident of ownership.[23]

The lower court has explicitly stated that the loss of Mrs. Perez' license is due to her status as a wife.[24] Management and control of the community property is also denied Mrs. Perez on the basis of her sex. If it were based on competence or business judgment, the cases would so state.

A. The Old Case Law.

The rather broad language used by the court in *Muller v. Oregon*[25] in upholding protective legislation for women has since been cited to justify the proposition that sex is a valid basis for legislative classification.[26] For example, in 1948 it was held that unless they are related to the male owner, women can be excluded from being bartenders.[27] In 1961 it was held that women may be excluded from jury services unless they first register with the clerk of the court their desire to serve.[28]

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[21]U.S. Constitution, Fifth and Fourteenth Amendments.

[22]See, *e.g., Lucas v. Forty-Fourth General Assembly of the State of Colorado,* 377 U.S. 713, 736 (1964); *Knoll Associates, Inc. v. F.T.C.,* 397 F. 2d 530, 535 (7th Circuit 1968); *Penna. Coal Co. v. Mahon,* 260 U.S. 393 (1922).

[23]See, *e.g., Ackerman v. Port of Seattle,* 329 P. 2d 210 (Wash. 1968); *U.S. v. Lutz,* 295 F. 2d 736 (5th Circuit 1961); *Smith v. Simpson,* 260 N.C. 601, 133 S.E. 2d 474 (1963).

[24]*Perez v. Campbell, supra,* at p. 624.

[25]208 U.S. 412 (1908).

[26]Three years before *Muller, Lochner v. New York* (198 U.S. 45 [1905]) had held that a law limiting the working hours of both men and women was unconstitutional as an infringement of the individual's right to contract.

[27]*Goesart v. Cleary,* 335 U.S. 464 (1948).

[28]*Hoyt v. Florida,* 368 U.S. 57 (1961). Contrast this with

(This footnote is continued on the next page)

Such reasons as were advanced for upholding classifications based on sex boil down to either the naked assertion that men and women are different,[29] clearly not a reason unless the difference can be shown to be relevant, or that women are weaker and less competent than men, that they are in need of special protection, and that the security of the family would be undermined if women were accorded the same treatment as men.[30]

In 1966, *United States v. Yazell* held valid a Texas law (since repealed) providing that a married woman did not have the capacity to make a binding contract.[31] Dissenting in that case was Justice Black:

> "The Texas law of 'coverture'. . . rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the

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exclusion of Negroes from juries which has been held to violate the due process and equal protection clauses of the Fourteenth Amendment. (See, *e.g., Reece v. Georgia,* 350 U.S. 85 (1955); *Eubanks v. Louisiana,* 356 U. S. 584 (1958).

[29]For example, *Goesart v, Cleary, supra,* gives no explicit reasons why women should not be permitted to act as bartenders, excepting wives or daughters of the owner.

[30]For example, p. 422, the *Muller* court said: "The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation." Another example is the language of *Bradwell v. The State,* 16 Wall. 130 (U. S. 1872), at p. 141: "Man is, or should be, woman's protector and defender . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."

[31]*U. S. v. Yazell,* 382 U.S. 341 (1966).

> one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being a female, is without capacity to make her own contracts and do her own business . . . It seems at least unique to me that this Court in 1966 should exalt this archaic remnant of a primitive caste system to an honored place among the laws of the United States."[32]

The foregoing cases are based on two myths: one is that women are incompetent dependents who, like children and mentally disturbed people, must be placed in separate legal categories for their own protection.[33] The second is that the preservation of the family depends on women being kept in the home.[34]

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[32] *Ibid.*, at 361.

[33] In *Muller v. Oregon*, 208 U.S. 412 (1908), at pp. 421-422, the Court said: "History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained."

[34] ". . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views, which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career of that of her husband. . . ." (*Bradwell v. The State*, 16 Wall. 130, 141 [U.S. 1892]).

Mrs. Perez is the victim of these myths. She was deprived of her driver's license through no fault of her own because of an Arizona law that assumes she is not competent to share in the management of the marital property. While the community property system recognizes the economic value of the wife's domestic contribution in caring for the home and children,[35] under this law the wife is denied the dignity of being treated as an adult endowed with reason, judgment and the capacity for economic responsibility.[36]

We will demonstrate that both these myths are false, that there is no rational ground for the rule that sex is a valid basis for legal classification and that the State has no defensible interest, compelling or otherwise, in this irrational legal rule.

B. The Historical Background.

In the absence of an enlightened judiciary, myths have historically been used to justify laws that deny women full citizenship.[37] Law and myth have interrelated to form self-perpetuating and self-fulfilling prophecies.[38]

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[35]See, *e.g.*, Harriet Daggett, "*The Civil-Law Concept of the Wife's Position in the Family*," 15 *'Ore. L. Rev.* 291 (1936).

[36]The second myth, that the preservation of the family hinges on keeping women submissive, obedient and economically dependent flows from and interrelates with the first. Those who fear that giving women full human rights must result in the destruction of the family fail to recognize that women, as well as men, need the affection, comfort and security of long-standing human relationships.

[37]See, *e.g.*, Simone De Beauvoir, *The Second Sex*, Modern Library, New York, 1968; Kate Millett, *Sexual Politics*, Doubleday & Company, New York, 1970.

[38]See, *e.g.*, De Beauvoir, *The Second Sex, op. cit.*, at pp. xxiii-xxiv of the Introduction: ". . . whether it is a race, a caste, a class, or a sex that is reduced to a position of inferiority, the methods of justification are the same . . . there are deep simi-

1. *Myth and the Law.*

Myths derogating women have been propounded by theologians, philosophers, and, more recently, scientists. It should be remembered, however, in evaluating the opinions of these men, that there have been other instances in history where divine or moral authority has been invoked to support injustice.[39] Slave owners, for example, justified slavery on the highest moral and religious authority.[40]

It should also be noted that from the outset there have always been voices speaking out against the subjection of women. Thus, while Aristotle said in his *Politics*:

> "We may thus conclude that it is a general law there there should be naturally ruling elements and elements naturally ruled . . . the rule of freeman over the slave is one kind of rule; that of the male over the female another. . . .",

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larities between the situation of woman and that of the Negro . . . In both case the former masters lavished more or less sincere eulogies, either on the virtues of the 'good Negro' with his dormant, childish, merry soul—the submissive Negro—or on the merits of the woman who is 'truly feminine'—that is, frivolous, infantile, irresponsible—the submissive woman."

[39]See, *e.g.*, Gunnar Myrdal, *An American Dilemma*, Harper and Bros. Publishers, New York, c. 1944, pp. 584-585 (American slavery); Ruth Benedict, *Race: Science and Politics*, Viking Press, New York, 1959, pp. 108, 143-146 (Europe, persecutions of Jews, Albigenses, Huguenots; Rhona Churchill, *White Man's God*, William Morrow & Co., New York, 1962, esp. p. 11 (South Africa; apartheid).

[40]An example of the moral language justifying slavery because the prophets, saints, apostles and martyrs all "went to glory from slaveholding countries and a slaveholding church" from the "Minutes of the General Assembly of the Presbytarian Church in the Confederate States of America," Vol. 1. Augusta, Ga., 1861, is reprinted at pp. 371-379 of *The Negro in American History*, Vol. II, William Benton, 1969.

Socrates believed in the equality of the sexes in intellectual and political activities.[41] It was, however, the opinion of Aristotle that was embodied in the Athenian laws. Women could not vote nor hold office; they could not own property; they could not conduct legal business; and each woman was the ward of her nearest male relative or her husband, and only through him did she enjoy any legal protection.[42]

A dramatic illustration of the use of myth to justify repressive laws are the witchcraft persecutions. The *Malleus Maleficarum,* the main document used in the suppression of witchcraft, deals extensively with the "evil nature of woman," explaining that:

> ". . . there was a defect in the formation of the first woman, since she was formed from a bent rib . . . since through this defect she is an imperfect animal, she always deceives . . . she is more carnal than man, as is clear from her many carnal abominations."[43]

A more recent example is Nazi Germany.[44] Nazi mythology described woman as an idealized breeding

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[41]Helen Bacon, "Woman's Two Faces: Sophocles' View of the Tragedy of Oedysus and His Family," in Jules H. Masterman, ed. *Science and Psychoanalysis,* Vol. 10, New York: Grune & Stratton, 1966, pp. 10-27.

[42]H. D. F. Kitto, *The Greeks,* Penguin Books, Inc., 1958, at p. 219. Despite our great historical emphasis on Athens, an emphasis that sometimes confused Athenian with Greek, we know these laws did not exist in all the city-states. In Sparta, for example, women's status was equal to that of men. They were given the same physical traning as boys, they participated in the games, and were educated through Spartan laws and institutions, to be "ideal citizens." See, *e.g.,* Charles Seltman, *Women in Antiquity,* Collier Books, New York, 1962.

[43]*Malleus Maleficarium,* transl. Montague Summers, London, Pushkin Press, 1948, in *Sisterhood is Powerful,* ed. Robin Morgan, Random House, New York, 1970, at p. 539.

[44]Some students of the Third Reich have observed that there is a general correlation between the extreme patriarchal character

machine. "The mission of woman is to be beautiful and to bring children into the world," said Joseph Goebbels.[45] Again these myths were the justification for repressive laws. For example, German women were forbidden to sit as judges when Hitler took over.[46] In an interview with a British journalist, Magda Goebbels had this to say about the matter:

> "The accounts printed in England about the expulsion of women from their jobs are highly exaggerated. The German woman has been excluded from only three professions: the military, the government and the practice of law."[47]

2. *The Common Law Influence.*

In this country, the myths about the inferiority of women clashed with the egalitarian ideas of the American Revolution. The common law tradition denying women elemental legal rights conflicted with the fundamental American conviction that each individual shall have the freedom to determine his own destiny and develop to the fullest his human potential.

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of Nazi Germany and its repressive authoritarianism. See, *e.g.*, David Schoenbaum, "*The Third Reich and Women*," in *Hitler's Social Revolution*, Doubleday & Co, New York, 1966, pp. 187-202.

[45]Quoted in George Mosse, *Nazi Culture*, Grossett and Dunlap, New York, 1966, p. 41.

[46]Another example is the Marriage Loans Law which took 8,000,000 women out of the labor market in 1933-34, although because of the German war economy and the armament efforts, the number of women in the labor force, albeit always in inferior and subordinate jobs, kept rising in the later years of the Third Reich. See, *e.g.*, Joseph K. Folsom's *The Family and the Democratic Society*, New York, John Wiley, 1943, p. 195.

[47]Quoted from the *Volkische Zeitung*, July 6, 1933, in George Mosse, *Nazi Culture*, *op. cit.*, p. 43.

The common law tradition accorded the wife no legal status whatsoever. As Blackstone said:

> "By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything . . . and her condition during her marriage is called her *coverture.*"[48]

It therefore followed that upon marriage a woman's personal property became her husband's; that he was given absolute control over all rents and profits from her real property, over which, with certain limitations, he was also give absolute control; that she could neither make contracts nor sue; and that, for all practical purposes, she had no legal status whatsoever.

After listing these and the other legal disabilities that coverture worked on the wife, including the right of the husband to "restrain her by domestic chastizement," Blackstone had this to say:

> "These are the chief legal effects of marriage during the coverture: upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England."[49]

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[48]Blackstone, *Commentaries,* Nineteenth London edition, Vol. I, Lippincott Co., 1908, p. 355.

[49]*Ibid.,* p. 366. To which one of the commentators to Blackstone felt compelled to add his own footnote starting page 366: ". . . I shall here state some of the principal differences in the English law, respecting the two sexes; and I shall leave it to the reader to determine on which side is the balance, and how far

During the nineteenth and early twentieth centuries, this rationalization of the suppression of women as being for their own good and protection reached almost hysterical proportions. While poor women, not to speak of slave women,[50] performed the most arduous physical labor under the most inhuman conditions[51] and prostitution flourished,[52] the ideal woman

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this compliment it supported by the truth." "Husband and wife, in the language of the law, are styled *baron* and *feme*; the word baron or lord attributes to the husband a not very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect, that if the baron kills his feme, it is the same as if he killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king . . ." Then he goes on to several other examples, among them: "By the common law all women are denied the benefit of clergy; and till the 3 and 4 W & Mc. 9 they received sentences of death and might have been executed for the first offense in simple larceny, bigamy, manslaughter, etc.; however learned they were, merely because their sex precluded the possibility of their taking holy orders; though a man who could not read was for the same crime subject only to burning in the hand and a few months imprisonment. . . ."

[50]See *e.g.*, Kate Millett, *Sexual Politics*, New York, Doubleday & Co., 1970, p. 72.

[51]See, *e.g.*, Wanda Neff, *Victorian Working Woman*, Columbia University Press, New York, 1929. Neff on p. 72 quotes the words of a woman who was a "drawer" in the coal mines of Little-Boston: "I have a belt around my waist and a chain passing between my legs, and I go on my hands and feet." See also Eleanor Flexner, *Century of Stuggle*, Belknap Press, Cambridge, 1959, and Millett, *op. cit.*, for accounts of working conditions for women factory workers in the early part of this century, conditions which led to such tragedies as the Triangle Fire where one hundred forty-six women, most of them young girls, died because of the lack of safety precautions for which one of the partners who owned the shop was fined twenty dollars.

[52]For an incisive study of Victorian morality, see G. Rattray Taylor, *Sex in History*, New York, Ballantine Books, 1954, Chapter XI.

was depicted as "pure", "chaste," and, of course, a lady. It was she who was being protected. The basis again was, more often than not, her role of "mother of the race."

As a United States Senator put it, in a last ditch argument against female suffrage:

> "Whether the child's heart pulses beneath her own or throbs against her breast, motherhood demands above all tranquility, freedom from contest, from excitement, from the heart burnings of strife. The welfare, mental and physical, of the human race rests to a more or less degree upon that tranquility."[53]

3. *The Beginnings of Reform.*

It was in the context of the hypocritical Victorian sentimentalization of women and the family that the contemporary feminist movement, with its theme of women, not as ladies, mothers or "fallen women," but simply as human beings, arose.

Three-quarters of a century after the Declaration of Independence heralded the birth of this country, women applied that document to their sex. They rewrote it to read: "We hold these truths to be self-evident, that all men and women are created equal."[54] By the turn of the century, women had won significant social and

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[53]Senator McCumber of North Dakota, Congressional Record, 65th Congress, 2nd Session, Vol. 56, Part 2, p. 10774 (1919) quoted in Flexner, *op. cit.*, p. 309.

[54]Flexner, *op. cit.*, p. 75. Flexner points out that organized feminism was a direct outgrowth of the abolitionist movement. The nineteenth century was the first time in American history when women organized in significant numbers. They organized initially not to help themselves, but to help those who were in greatest need of help: slaves.

legal reforms. "Responding in great part to the rising tide of individual and organizational protest against the married women's status of legal subjugation to her husband," most American states passed some version of the Married Women's Act, conferring upon wives such basic rights as the right to contract, to sue, and to work outside the home without the husband's permission.[55] Also for the first time in their history women were given access to higher education.[56] At last women in the western world had some opportunity to refute the myths about their moral and intellectual inferiority.[57] These myths were also coming under attack due to social changes linked in part to the Industrial Revolution, the growing emphasis on science and rational thought, and the further growth of humanitarian ideals.

4. *Anatomy Is Destiny.*

Despite persistent handicaps, women in ever-growing numbers began to take advantage of new opportunities. Women seemed well on the road to achieving full citizenship. To counteract these gains that many still considered scandalous,[58] there now arose a new mythology, cloaked in scientific terminology. Freud's theo-

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[55]Leo Kanowitz, *Women and the Law, The Unfinished Revolution,* Univ. of New Mexico Press, Albuquerque, 1969, p. 40 ff.

[56]See, *e.g.,* Mabel Newcomer, *A Century of Higher Education for American Women,* Harper Bros., N.Y., 1969.

[57]Marie Curie won the Nobel prize in physics in 1903. Against tremendous opposition, the first woman doctor in the United States, Elizabeth Blackwell, founded her own clinic and school in New York in 1857. After *Bradwell v. The State, supra,* in 1872 denied women the constitutional right to practice law, the Supreme Court in 1879 admitted Belva Lockwood as the first woman lawyer entitled to practice at its bar. See discussion in Flexner, *op. cit.,* pp. 113-130.

[58]See, *e.g., Flexner, op. cit.,* pp. 294-305 ("Who Opposed Woman Suffrage").

ry of woman as an incomplete male was tailor-made to bolster sagging patriarchal dominance and again justify keeping women in "their place."[59]

Followers of Freud, while sifting through and rejecting a number of his other theoretical observations, have often chosen to go along with him on the subject of women. Erik Erikson declares that mature womanly fulfillment rests on "the fact that a woman's somatic design harbors an 'inner space' destined to bear the offspring of chosen men, and with it, a biological psychological and ethical commitment to take care of human infancy."[60]

The latest theory, as Joseph Rheingold succinctly put it, was: "Anatomy decrees the life of a woman."[61]

C. The Contemporary Evidence.

Laws in a democratic society recognize that individual differences are more significant than stereotypes based on race or sex. The contemporary social and scientific evidence is that sexual stereotypes are no more tenable than racial ones.

As John Stuart Mill put it:[62]

> "Standing on the ground of common sense and the constitution of the human mind, I deny that anyone knows, or can know, the nature of the

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[59]See Sigmund Freud, *Some Psychological Consequences of the Anatomical Distinctions Between the Sexes* (1925), Collected Papers, Vol. V, p. 190.

[60]Erik Erikson, *Inner and Outer Space: Reflections on Womanhood*, Daedalus (93), 1964.

[61]Joseph Rheingold, *The Fear of Being a Woman*, New York, Grune and Stratton, 1964, at p. 714.

[62]John Stuart Mill, "The Subjection of Women" (1869), reprinted in *Three Essays by J. S. Mill*, World's Classics Series, London, Oxford University Press, 1966, p. 451.

two sexes, so long as they have only been seen in their present relation to one another. . . . What is now called the nature of women is an eminently artificial thing—the result of forced repression in some directions, unnatural stimulation in others. It may be asserted without scruple that no other class of dependents have had their character so entirely distorted from its natural proportions by their relations with their masters."[63]

1. *Sex and Gender.*

Contemporary work in psychology, anthropology, sociology, and, more recently, biology indicates that much human behavior is learned.[64] No one would seriously suggest today that man's anatomy is his destiny. Man has developed learned patterns of behavior, or cultures, that vary widely from place to place and from time to time.[65] Man is not the prisoner of his instincts.[66]

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[63]Mill also recognized the use of the law in perpetuating myths: "That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other . . ." Mill, *op. cit.*, p. 427.

[64]See, *e.g.*, J. Dollard and N. E. Miller, *Personality and Psycotherapy: an Analysis in Terms of Learning, Thinking, and Culture*, McGraw, New York, 1950; R. R. Sears, "Social Behavior and Personality Development," in *Toward A General Theory of Action*, ed. T. Parsons and E. A. Shils, Cambridge, Howard University Press, 1951, pp. 465-476.

[65]See *e.g.*, Ruth Benedict, *Patterns of Culture;* Houghton-Mifflin, 1959; Margaret Mead, *Sex and Temperament in Three Primitive Societies*, New American Library, 1950. On the evolution of thought with time see, *e.g.*, Arnold J. Toynbee, *A Study of History*, Oxford Univ. Press, New York, 1962 (in three volumes), esp. Vol. I, p. 1-51, 51-183.

[66]Even the few contemporary exponents of the instinct school of behavior, such as Ardrey and Lorenz (Konrad Lorenz, *On*

(This footnote is continued on the next page)

A recently developing body of scientific knowledge indicates that, despite all the pronouncement on the subject, there is no convincing evidence that the present status, role and temperament distinctions between male and female are biologically based. On the contrary, the research indicates that gender, that is, the sum of personality traits usually associated with sex, is overwhelmingly determined by cultural factors.

> "Gender is a term that has psychological or cultural rather than biological connotations. If the proper terms for sex are 'male' and 'female,' the corresponding terms for gender are 'masculine' and 'feminine': these latter may be quite independent of [biological] sex."[67]

Studies at the California Gender Identity Center dramatically point out that differences in gender are primarily culturally induced. For example, it was found easier to change surgically the sex of an adolescent male who had been wrongly classified as female, than

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Aggression, Harcourt, 1966; Robert Ardrey, *The Territorial Imperative*, Atheneum, 1966), have not argued that women are the prisoners of their biology. For example, among lions it is the lioness, not the lion, who, according to the first actual studies of lion societies, does the bulk of the hunting, (*E.g.*, George B. Schaller, "Life with the King of Beasts," 135 *Nat. Geographic*, pp. 494-519 [April, 1969].) For a study of animals where male and female members all cooperate in rearing the young, see Farley Mowat, *Never Cry Wolf*, Dell Publ. Co., New York, 1963.

[67]Robert J. Stoller, *Sex and Gender*, New York, Science House, 1968, pp. viii-ix, one of the leading workers in the field, differentiates between sex and gender as follows: "The word *sex*, in this work will refer to the male or female sex and the component biological parts that determine whether one is a male or a female; the word *sexual* will have connotations of anatomy and physiology. This obviously leaves tremendous areas of behavior, feelings, thoughts and fantasies that are related to the sexes and yet do not have primarily biological connotations. It is for some of these psychological phenomena that the term *gender* will be used.

to undo the consequences of a lifetime of socialization which had given him a female self-image and made him temperamentally feminine in gender, to the extent that his personality, interests, gestures, and self-image were totally feminine.[68]

> "The condition existing at birth and for several months thereafter is one of psychosexual undifferentiation. Just as in the embryo, morphologic sexual differentiations become fixed and immutable—so much so, that mankind has traditionally assumed that so strong and fixed a feeling of personal sexual identity must stem from something innate, instinctive, and not subject to postnatal experience and learning. The error of this traditional assumption is that the power and permanence of something learned has been underestimated. The experiments of animal ecologists on imprinting have now corrected this misconception."[69]

Work in other fields tends to validate the conclusion that gender roles are primarily determined by postnatal forces. Experiments in endocrinology and genetics have failed to yield any definite evidence that hormones are responsible for mental and emotional differences between the sexes.[70] Experiments in hypnosis indicate

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[68]See also, John Money, "Developmental Differentiation of Femininity and Masculinity Compared," in *The Potential of Women*, McGraw Hill, 1963, pp. 51-65.

[69]John Money, "Psychosexual Differentiation," in *Sex Research, New Developments*, New York, Holt, 1965, p. 12.

[70]For a summary, see *Biology and Behavior*, ed. David C. Glass, New York, Rockefeller Univ. and the Russell Sage Foundation, 1968. "In the absence of complete evidence," writes Robert Stoller, "I agree in general with Money, and the Hampsons who show in their large series of intersexed patients that gender role is determined by postnatal forces, regardless of the anatomy and physiology of the external genitalia." Stoller, *op. cit.*, p. 48.

that even physical characteristics, such as muscular strength, are greatly affected by cultural conditioning. For example, in a study done at the University of California at Los Angeles, female students who considered themselves frail, were, under hypnosis, able to lift forty pounds and upward, showing an increase in weight-lifting ability of almost 100 percent.[71]

> "Implicit in all the gender identity development which takes place through childhood is the sum total of the parents', the peers', and the culture's notions of what is appropriate to each gender by way of temperament, character, interests, status, worth, gesture, and expression. . . . Whatever the 'real' differences between the sexes may be, we are not likely to know them until the sexes are treated differently, that is, alike."[72]

2. *Contemporary Social Conditions.*

The stereotype of woman as "always dependent," "needing special care," and "properly placed in a class by herself" because she is lacking in "physical strength, in the capacity for long continued labor . . . the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence" is totally incompatible with present social realities.[73]

Despite laws such as the Arizona law here in issue keeping women economically dependent and penalizing them for their feminine status, women have increasingly made valuable contributions in all areas of society.

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[71]Experiments performed by Professor Sydney Walter at the University of California at Los Angeles, Department of Psychology, 1963.

[72]Millett, *op. cit.*, pp. 29, 31.

[73]*Muller v. Oregon, op. cit.*, pp. 421-422. For the language used by the Court see notes 30 and 33, *supra.*

With the shift from an agrarian society, where the home was the main unit of economic production, to a highly technological society where production is more centralized, women have increasingly made their contributions both inside and outside the home.

By the turn of the century, five million American women worked outside their homes.[74] Although both World Wars I and II marked peak periods of female employment outside of the home,[75] by 1968 almost thirty million women were full time members of the labor force, nine million more than at the wartime employment peak of 1944.[76] Not only are women, including married women and mothers,[77] increasingly engaged in productive occupations outside of the home, but in 1967, 5.2 million American families were headed by women.[78]

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[74] *1969 Handbook on Working Women*, U.S. Dept. of Labor, Women's Bureau Bull., No. 294, p. 9. For some of the history of how both men and women began to move out of the home and into the factories, see, e.g., Caroline Bird, *Born Female*, Simon & Schuster, New York, 1969, Chapter 2, pp. 16-39. At p. 19, Bird writes: "It was profitable for the owner to hire women over men, since he could pay them less."

[75] "One of the ironies of history is that war has brought American women their greatest economic opportunities." *American Women*, Report of the President's Commission on the Status of Women, October, 1963, p. 3.

[76] *1969 Handbook on Women Workers, op. cit.*, p. 9. "Since 1940 American women have been responsible for the major share in the growth of the labor force. They accounted for about 65 percent of the total increase from 1940 to 1968, and their representation in the labor force has risen from one-fourth to almost two-fifth of all workers." *Handbook on Women Workers, op. cit.*, p. 5.

[77] *Handbook on Women Workers, op. cit.*, pp. 23, 37 ff. In March, 1967, 10.6 million working women were mothers of children under the age of eighteen, and 4.1 million of these had children under six. *American Women 1963-1968*, Report of the Interdepartmental Committee on the Status of Women, 1968, p. 5.

[78] *Handbook on Women Workers, op. cit.*, p. 31.

Today there are outstanding women in all professions. Women have won Nobel prices in physics, chemistry, literature, and peace.[79] The increasing number of women in public life, in politics, on the bench, and in business and industry, in short, the creative contributions of women everywhere, are further proof of how outmoded sex-based classifications are.[80]

D. Trends in Contemporary Law.

Laws that perpetuate the classification of individuals by their sex are no longer functional for either the affected individuals or society at large.

1. *The Egalitarian Theme.*

In recent decisions there is a trend away from the notion that sex is a valid basis for legislative classification. For example, in 1968 the Pennsylvania Supreme Court held that a statute sentencing women differently from men upon conviction of the same crime was unconstitutional.[81] The same result was reached

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[79]See, *e.g.*, *World Almanac*, 1970, p. 452.

[80]See, *e.g.*, Women's Heritage Calendar and Almanac, Graphic Communications Consultants, Santa Monica, California, 1970; Mabel Newcomer, *op. cit;* Ashley Montagu, *The Natural Superiority of Women*, Collier-Macmillan Ltd., London, rev. ed. 1970. The difficulty that women share with ethnic and racial minorities in finding documentations for their heritage and achievement is noted by, *e.g.*, Arthur M. Schlesinger in *New Viewpoints in American History*, New York, 1928: "An examination of the standard histories of the United States and the history text-books in use in our schools raises the pertinent question whether women have ever made any contributions to American national progress that are worthy of record . . . Any consideration of women's part in American history must include the protracted struggle of the sex for larger rights and opportunities, a story that is in itself one of the noblest chapters in the history of American democracy." (Quoted in Flexner, *op. cit.*, Preface, p. viii.)

[81]*In Commonwealth v. Daniels*, 430 Pa. 642, 243 A. 2d 400 (1968).

that same year in a Federal district court decision.[82] In *Rosenfeld v. Southern Pacific Co.*,[83] a Federal district court declared invalid California protective laws that give differential treatment to woman workers solely on the basis of their sex. Similarly, a New York court held that a policewoman could not be denied the right to take an examination for promotion on the basis of sex.[84]

Egalitarian legislation, such as the Nineteenth Amendment, the Equal Pay Act of 1963,[85] and Title VII of the 1964 Civil Rights Act[86] constitute landmark constitutional and legislative recognition that sex-based discrimination is obsolete.

The Equal Employment Opportunities Commission, in interpreting Title VII, has stated that, as a general rule, employers may not maintain separate job classifications based on sex and that individuals may not be refused employment because of assumptions or stereotypes about members of their sex.[87]

In 1919, the first state equal pay for equal work law was passed. By 1968, thirty-six states had such laws, and today the number is higher.[88] In 1965 the

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[82]*United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. C. Conn. 1968).

[83]*Rosenfeld v. Southern Pac. Co.*, 293 F. Supp. 1219 (Cent. D. Cal. 1968) (appeal now pending).

[84]*Shpritzer v. Lang*, 32 Misc. 2d 693, modiifed and affirmed, 234 N.Y.S. 2d 285, 289-290 (New York 1962).

[85]See discussion in Kanowitz, *op. cit.*, pp. 131-135.

[86]78 Stat. 253, 42 U.S.C. §2000 *et seq.* (1964).

[87]Sonia Pressman (Senior Attorney in the Office of the General Counsel at the Equal Employment Opportunity Commission in Washington, D. C.), "The Quiet Revolution," IV *Family Law Quarterly*, p. 31 at 33 (1970).

[88]See discussion in IV *Family Law Quarterly*, at p. 3 (1970).

President of the United States promulgated Executive Order 11246 forbidding sex-based discrimination in government employment.

2. *The Partnership Theme.*

Under the early Spanish law, from which much American community property law is derived, the husband and wife were regarded as separate individuals engaged in a common enterprise, or partnership, rather than as a mythical "unity." The wife was therefore given property rights as an individual, in both her separate property and the marital community.[89] In this country, the confusing juxtaposition of the common law and the civil law in community property states at first resulted in the erosion of some of the wife's rights.[90]

The later history of this body of law marks a step by step improvement in the position of the wife. For example, in California the husband was in 1891 restricted from making gifts without his wife's consent out of the community property.[91] In 1901 the wife's written consent was required by law for sale or encumbrance of household furnishings and clothing.[92] In 1917 the husband was forbidden from conveying real

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[89]See Daggett, *op. cit.*, pp. 293, 298.

[90]See, *e.g.*, Kanowitz, *op. cit.*, p. 63. *Cf.* Daggett, *op. cit.*, 300-301, describing the civil law concept of a wife as a "public merchant."

[91]Cal. Stats. 1891, Ch. 220, p. 425, §1 (now Cal. Civil Code §5125).

[92]Cal. Stats. 1901, Ch. 190, p. 598, §1 (now Cal. Civil Code §5125).

property without the wife's joinder.[93] In 1923 the wife was given the power of testamentary disposition over her one-half of the community property.[94] What remains now is to complete this process by giving the wife a share in the control and management of her own property.

E. The Racial Parallel.

The Negro struggle for civil rights, which has been compared to the struggle of women, was also hindered by a morass of myths.

> "As the Negro was awarded his 'place' in society, so there was a 'woman's place.' In both cases the rationalization was strongly believed that men, in confining them to this place, did not act against the true interest of the subordinate groups. The myth of the 'contented woman,' who did not want to have suffrage or other civil rights and equal opportunities, had the same social function as the myth of the 'contended Negro.' "[95]

"The rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issue of human rights."[96]

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[93]Cal. Stats. 1917, Ch. 583, p. 829 §2 (now Cal. Civil Code §5127).

[94]Cal. Stats. 1923, Ch. 18, p. 29, §1 (now Cal. Prob. Code §201).

[95]From Myrdal, *An American Dilemma*, quoted in Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *Geo. Wash. L. Rev.* 232, 234 (1965).

[96]Murray and Eastwood, "Jane Crow and the Law," *op. cit.*, 232, 235.

It has been noted that women, like Negroes, form part of a permanent class which they cannot escape or modify. As one commentator put it:

> "Not only are race and sex entirely comparable classes, but there are no others like them. They are large, permanent, unchangeable, natural classes. No other class is susceptible to implications of innate inferiority. Aliens, for instance, are essentially a temporary class, like an age class. Only permanent and natural classes are open to those deep, traditional implications which become attached to classes regardless of the actual qualities of the members of the class."[97]

F. Conclusion.

We ask this Court to rule that the suspension of Mrs. Perez' driver's license and the expropriation of her right to share in the management and control of her own property, based, as they are, on her sex, amount to a denial to her of the equal protection of our laws. We ask this Court to clarify the legal status of women[98] and to overturn the discriminatory and discredited rule that sex is a reasonable basis for legislative classification. In the words of the former chief Justice of the California Supreme Court, Roger J. Traynor:

> "Courts have a creative job to do when they find that a rule has lost its touch with reality and

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[97]Blanche Crozier "Constitutionality of Discrimination Based on Sex," 15 *Boston L. Rev.* 723, 727-8 (1935).

[98]In *U.S. v. Dege* (1960), 364 U.S. 51, this Court has already repudiated the doctrine that husband and wife are one, refusing to be "obfuscated" by a medieval fiction.

should be abandoned or reformulated to meet new conditions and new moral values. . . . We do a great disservice to the law when we neglect that careful pruning on which its vigorous growth depends and let it become sicklied over with nice rules that fail to meet the problems of real people."[99]

Sixteen years ago this Court stated: "Classifications based solely upon race must be scrutinized with particular care, since they are . . . constitutionally suspect."[100] Last year this Court said: "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race. . . ."[101]

Like race, sex is determined not by choice, but by birth. Like race, sex has in the past been used to deprive individuals of important civil rights.[102] Just as racial differences do not justify differential treatment under the law,[103] there is scientific and sociological proof[104] that classifications based on sex are equally unreasonable.

As has been often pointed out, individual variations are far more significant than generalities about ethnic,

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[99]Roger J. Traynor, "Law and Social Change in a Democratic Society," 1956 *U. Ill. L. F.* 220, 232, 236.

[100]*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[101]*McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969).

[102]The right to practice law, *Bradwell v. the State*, 16 Wall. 130 (U.S. 1872); the right to freely contract, *Muller v. Oregon*, 208 U.S. 412 (1908); the right to enter an occupation of their choice, *Goesart v. Cleary*, 335 U.S. 464 (1948); the right to make a binding contract, *U.S. v. Yazell*, 382 U.S. 341 (1966).

[103]*Bolling v. Sharpe, op. cit.; Brown v. Board of Education*, 347 U.S. 483 (1954).

racial or sexual characteristics.[104] In the case of women, these variations must also be held the only permissible basis for classification inasmuch as there is no factual basis for the classification of women as incompetent or inferior. It was, however, precisely on that basis that Mrs. Perez was deprived of two fundamental and important rights.

This Court has held that a classification that penalizes the exercise of a basic constitutional right is unconstitutional and invidious discrimination "unless shown to be necessary to promote a compelling governmental interest."[105] It is hard to imagine what interest a state might have in depriving wives of personal and property rights. It has been said that the domination of the wife by the husband is necessary to the stability and protection of the family,[106] but such an argument is totally untenable in the context of contemporary democratic society and in the light of our standards of what is just and equitable. The notion that the family can only be preserved by maintaining wives in an inferior and economically dependent status is repugnant to all current ideas about famil-

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[104]*E.g.*, Murray and Eastwood, *op. cit.*, pp. 245-246.

[105]*Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); for an early formulation of this rule see *Skinner v. Oklahoma*, 361 U.S. 535 (1942).

[106]"It seems to me as if the God of our race has stamped upon [the woman] a milder, gentler nature which not only makes them shrink from but disqualifies them from the turmoil and battle of public life. . . . Their mission is at home. . . . It will be a sorry day for this country when those vestal fires of love and piety are put out." Senator Frelinghuysen, "Congressional Globe," 39th Congress (1867), 2nd Session, Part I, p. 5, in Flexner, *op. cit.* pp. 148-149.

ial affection and mutual responsibility. In holding for Mrs. Perez, the Court will also further the original goal of the civil law and its evolution toward a mutual partnership.[107]

In weighing individual rights against traditional concepts of the family, this Court in 1968 held that an illegitimate child cannot be deprived of wrongful death benefits.[108] The parallel is striking: an accident of birth, be it sex or legitimacy, cannot be used to justify a classification that deprives an individual of personal and property rights under the law.

There is no compelling state interest, in fact, no interest at all, in perpetuating and continuing an outmoded and unreasonable method of legal classification. We respectfully urge that the Court extend to Mrs. Perez and to 110 million other American women the equal protection of our laws. As the President's Commission on the Status of Women stated:

> "Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land. . . ."[109]

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[107]"The ordinary and well-known principles of commercial partnership could be made applicable to a marital unit, and with few modifications could bring legal sanction to those couples who regard marriage as a mutual and cooperative social undertaking." Daggett, *op. cit.*, p. 305.

[108]*Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guarantee and Liab. Ins. Co.*, 391 U.S. 73 (1968).

[109]*American Women*, Report of the President's Commission on the Status of Women (Oct., 1963), p. 44.

The *amicus curiae* urges the Court to face the constitutional question of whether sex is a legitimate basis for legislative classification and to decide that such a classification violates the equal protection clause of the Fourteenth Amendment.

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